80-2212

No.

Office-Supreme Court, U.S.
FILED
JUN 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MRS. MAXINE BARBALICH, ET AL.,
Petitioners,

versus

AMERICAN AUTOMOBILE ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Whether the Fifth Circuit unconstitutionally interfered with petitioners' rights to a jury trial under the Seventh Amendment to the United States Constitution, by improperly attempting to redetermine the findings of fact that had been reached by the jury, and thus holding that the case should not have been submitted to the jury on negligence and causation.

PARTIES TO THE PROCEEDING

Under Rule 21.1(b), counsel for Petitioners certifies that the following are parties to this proceeding:

Mr. Maxine Barbalich, widow of Charles A. Bellanger, Petitioner

Mrs. Carole Bellanger, wife of Steven Nash, Petitioner

Mrs. Joan Bellanger, wife of Thomas E. Francis, Petitioner

American Automobile Association, Respondent

JAMES A. BABST

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No.

IN THE
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MRS. MAXINE BARBALICH, ET AL.,
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AMERICAN AUTOMOBILE ASSOCIATION,
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On Petition for Writ of Certiorari to the
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For the Fifth Circuit

PETITION FOR CERTIORARI

Petitioners, Mrs. Maxine Barbalich, widow of Charles A. Bellanger, Mrs. Carole Bellanger Nash, and Mrs. Jean Bellanger Francis, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding April 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, which remains unpublished, appears in the Appendix hereto, as does the Judgment denying the application for rehearing.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on March 6, 1981. A timely petition for rehearing was denied on April 1, 1981, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISION RELIED ON

Petitioners' base their petition for a writ of certiorari on the Seventh Amendment to the United States Constitution, which states that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This proceeding originated as a diversity suit for wrongful death and personal injuries which occurred in a vehicle collision during a shore excursion in Guatemala, on October 30, 1974.

The plaintiffs and petitioners for a writ of certiorari are Mrs. Charles A. Bellanger, who filed suit for her own injuries, and for the wrongful death of her husband, and the daughters of the Bellangers, Carole and Jean, who are suing for the loss of their father, who was killed in the incident.

The defendants who remained in the suit at the close of pretrial discovery included: (1) The American Automobile Association ("AAA"), which sold the Bellangers their cruise and excursion tours, and which escorted them on the cruise and tours; (2) Columbus Lines, Inc., d/b/a Columbus International ("Columbus"), which created and organized the tour; (3) Royal Viking Lines, Inc. ("Royal Viking"), operator of the cruise ship; (4) Gray Line Tours of Guatemala, a/k/a Guatemala Sightseeing Enterprises ("GSE"), which provided a bus involved in the accident; and (5) Andrew Garcia ("Garcia"), the driver of the bus.[1]

---

1 Pretrial discovery sifted out irrelevant defendants joined originally, including Greyhound Corporation; Greyhound Bus Lines, d/b/a Greyhound Sightseeing of Guatemala. Summary judgments were awarded the insurance companies of Columbus and

A. Factual Background Of The Case.

The background of this accident case began in early 1974, when Mr. and Mrs. Charles Bellanger began to plan their annual vacation, as they did every year. Mr. Bellanger was an employee of New Orleans Public Service Inc., and he and his wife saved up enough money to take a trip each year. (T. 193).

As they had done in the past, they contacted Ms. Zelia Prejean ("Prejean") for their travel advice. Ms. Prejean was a Senior Travel Counselor with the Worldwide Tour Division of the American Automobile Association. (T. 23). The Bellangers had dealt with her on past occasions in arranging travel plans (T. 177), and they had developed a personal relationship with her and trusted her. (T. 177).

As she had done in the past, Ms. Prejean offered advice on possible tours. One tour which she praised highly was a Central American tour she was herself organizing. (T. 178). In fact, she explained, she was not simply organizing this tour, but planned to escort it. (Id.)

The tour involved a cruise aboard the SS ROYAL VIKING SEA, and would carry tour members to exotic

---

AAA, on the technical grounds neither insured was a Louisiana domiciliary, and the Louisiana Direct Action statute did not apply. The Grey Line Sight-Seeing Companies, Associated, Inc. also obtained summary judgment when it was established this party had no connection to this case.

ports of call in Mexico, Guatemala, and that region. Ms. Prejean's information impressed the Bellangers, especially her announcement that she would personally escort the members of the tour she was putting together. The Bellangers enjoyed travel, but preferred to travel as members of a tour group. (T. 177).

As Mrs. Bellanger would point out:

> ". . . There was always someone that ran the tour, of course, the tour guide." (Id.)

Ms. Prejean excited their imaginations with descriptions of the shore excursions featured in the tour. The Bellangers asked her which excursions she planned to take. One was the excursion to Lake Izabel at Puerto Barrios. Mr. Prejean's selling efforts paid off. Assured that she would join the cruise and certain shore excursions, the Bellangers elected to sign up for the seventeen-member tour group Ms. Prejean was organizing. (T. 178, 36). They purchased tickets for the cruise as well as the Puerto Barrios excursion, in the secure knowledge that Ms. Prejean would be along to accompany them. (T. 179-181).

Ms. Prejean eventually assembled a seventeen-member group to join the cruise. (T. 178). The cruise, of course, was run by Royal Viking Lines, and the creator of the tour was Columbus.

At Puerto Barrios, Guatemala, the Bellangers joined Ms. Prejean for the Lake Izabel excursion. This consisted of a five-hour boat ride down the Rio Dulce River, followed by lunch at a hotel. (T. 184).

After lunch, the Bellangers were taken across Lake Izabel to a landing area where two buses awaited the tourists for the journey back to the ship. (T. 185). A third bus was due, but late in arriving. The Bellangers took seats on the first bus. (Id.)

The tragedy struck during this journey back to the ship. On a paved road, the bus collided head on with a small truck. (T. 84). The driver of the Bellanger bus failed to swerve, and failed to slow his speed, despite protests from one passenger. (R. 153).

Mrs. Bellanger sustained serious injuries. Mr. Bellanger sustained mortal ones.

B. Trial Of The Matter.

Prior to trial, Columbus and Royal Viking settled with the plaintiffs, but remained in the litigation because AAA had filed against them a third party complaint for indemnity and/or contribution.

The Court ordered a bifurcated trial. The principal complaint against AAA was heard March 20-22, 1978.[2]

2 GSE and Garcia did not answer the complaint, and did not appear at the trial. AAA is thus the only party to this proceeding on this writ, and has been listed as such, although technically AAA would possibly have 3rd party rights if the writ is granted.

The jury returned a verdict in favor of the plaintiffs, for $267,000.00. (T. 411-412).

The third party complaint was heard March 28, 1978. The jury here returned a verdict in favor of AAA, against both Columbus and Royal Viking, for contribution but not indemnity. (T. 642-647).

On June 15, 1978, the District Court rendered a judgment affirming the jury verdict. (T. 642-647). The Court also rendered judgment in default against GSE. It dismissed Garcia, after determining that it had no *in personam* jurisdiction over him.

Columbus, Royal, AAA, and GSE were thus found solidarily liable, and AAA and GSE were held solidarily liable for one-half the jury verdict under *Harvey v. Travelers Ins. Co.*, 163 So.2d 915 (La. App. 3 Cir. 1964). The Court denied AAA's motion for a Judgment N.O.V., and for a new trial. (T. 666-667).

An appeal to the United States Court of Appeals for the Fifth Circuit followed. The Court of Appeals reversed the jury verdict, based upon two ideas: (1) that AAA employee Zelia Prejean's duty to the Bellangers, if she ever had one, terminated after they left her to board the first bus, and, (2) that even had Prejean accompanied the Bellangers on the first bus, "the evidence does not show that she could have prevented the accident from happening." (Opinion, p. 6a).

The Fifth Circuit held the case should not even have been presented to the jury on the issues of causation and negligence.

REASONS FOR GRANTING THE WRIT

The Decision Below Incorrectly Applies The Settled Standard Of Review Of Jury Verdicts, As Articulated By The U.S. Supreme Court, And In So Doing Interferes With Petitioner's Rights To A Trial By Jury Granted By The Seventh Amendment To The Constitution Of The United States.

This Petition rests upon the contention that the action of the Fifth Circuit in reversing and setting aside the jury verdict rendered in the district court constituted an unconstitutional interference with petitioners' rights under the Seventh Amendment to the United States Constitution.

That amendment states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The very limited power of an appeals court to set aside a jury verdict because of the Seventh Amendment was made clear by the United States Supreme Court early in the nineteenth century, in decisions such as *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 732,

28 U.S. 443 (1830). In the context of personal injury actions, such as the one *sub judice*, the United States Supreme Court has declared unequivocally that appeals courts have no power to relitigate the fact findings of a jury, or to substitute their own judgment for that of a jury simply because they would have come to different conclusions.

In *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 88 L.Ed. 520 (1943), an action was instituted by a widow under the Federal Employers Liability Act for the wrongful death of her husband. The jury returned a verdict in favor of the plaintiff, and the district court entered judgment accordingly. On appeal, the Seventh Circuit reversed on grounds that there was no substantial proof that defendant's negligence was a proximate cause of Tennant's death. The Seventh Circuit held a directed verdict or judgment n.o.v. should have been entered below.

The United States Supreme Court granted certiorari "because of important problems as to petitioner's right to a jury determination of the issue of causation." 88 L.Ed at 523. The Supreme Court went on to reinstate the jury verdict, after analysis of the record and appeals court decision revealed that the Seventh Circuit had merely re-evaluated conflicting inferences and evidence to reach a conclusion different than that the jury had reached.

The Supreme Court declared:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . (citations omitted)
>
> That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

88 L.Ed at 525.

The Supreme Court went on to hold that since it could not say "that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence," *Id.*, it would reverse the Seventh Circuit and reinstate the jury verdict.

In *Atlantic and Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780, reh. denied, 369 U.S. 882, 8 L.Ed.2d 284, 82 S.Ct. 1134 (1962), a personal injury case, this Court affirmed its position in *Tennant*, pointing out that:

> "[N]either we nor the Court of Appeals can determine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law'." 7 L.Ed.2d at 803.

See too: *Dennis v. Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208, 11 L.Ed.2d 256, 84 S.Ct. 291 (1963).

The Fifth Circuit, of course, is supposed to apply the same standards of review, and in decisions such as *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)[3]

3 *Boeing Co.* is the leading decision of the Fifth Circuit defining applicable standards of review. See too: *Miskell v. Southern Food Company*, 439 F.2d 790 (5th Cir. 1971).

has acknowledged that it will try to follow these standards. As articulated in *Boeing Co.*, this standard requires that:

1. Evidence on appeal should be considered by the reviewing Court "in the light most favorable to the party" who prevailed in the district court before the jury; and,

2. Jury verdicts may be reversed by a reviewing court only if "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes reasonable men could not arrive at a contrary verdict. . ."

The difficulty with the Fifth Circuit's decision is that it pointedly fails to adhere to the standards required by the Seventh Amendment, and incorporated into the decisions of the United States Supreme Court and of the Fifth Circuit.

The opinion, though loosely couched in language which attempts to bring it under the umbrella of *Boeing Co.*, is a flagrant exercise by the Fifth Circuit into sifting the evidence, and redetermining the fact conclusions and the inferences from the facts, which the jury had found.

The evidence presented to the jury was more than ample to enable a jury to reasonably conclude that Ms.

Prejean, and hence AAA, was negligent, and that this negligence was a proximate cause of the accident and injuries sustained.[4]

A. The Jury Reasonably Concluded That Ms. Prejean Breached A Duty To The Bellangers, And The Fifth Circuit Should Not Have Disturbed This Conclusion.

The record below demonstrated that the Bellangers and AAA employee Prejean had many previous dealings with one another. She had planned previous vacations for them (T. 23, 24, 27), and the Bellangers, had taken tours she had arranged (T. 175), trusted her counsel (T. 177), learned of the fateful Central American trip through Prejean's solicitation (T. 32), purchased tickets for the trip upon her assurance that she would accompany them (T. 178-179), and would not have embarked upon the trip but for those factors (T. 180-181, 212).

The first prong of the Court of Appeals' opinion was that Prejean's failure to keep the Bellangers with her, thereby keeping them off the first bus, which became involved in the automobile collision, was not actionable because she had no power to force them to wait for a second or third bus. In the Court of Appeals' words:

---

4 It is important to note that arguably the jury might have found more than one proximate cause for the accident. The point is that it found Prejean's negligence to be *a* proximate cause, and this is sufficient to support the jury verdict.

"(E)ven had Mrs. Prejean asked the Bellangers to wait, the evidence is that the Bellangers would not have waited for the last bus." Opinion, p. 6a.

In expressing that opinion, the Fifth Circuit callously disregarded the applicable test for review. Instead of inquiring whether the jury reasonably could have concluded, as it did, that Prejean could have kept the Bellangers with her, it evaluated the evidence de novo and simply ruled as it might have viewed the evidence, sitting itself as a jury. That is not the proper function for the reviewing court.

The evidence in fact demonstrated that the jury reasonably could have concluded that Prejean breached a duty to the Bellangers, and that this breach was a proximate cause of their disaster.

Without ambiguity, the testimony showed that Prejean never attempted to advise or instruct the Bellangers which bus to take (T. 49). She did not disclose to them that another bus was coming, although she knew this to be the case (T. 50). No one offered the Bellangers the opportunity to wait for another bus (T. 184). And once on the bus, Prejean made no effort to check on their welfare (T. 185).

In holding that Prejean had no duty to suggest caution to the Bellangers or to suggest that they remain to travel with her, the Fifth Circuit ignored *uncontradicted*

expert testimony that travel escorts, as a matter of reasonable care, should keep those they are escorting with them. Travel expert William McIntosh testified that:

> "[P]articularly in foreign countries, . . . you never know quite what to expect, and yet the escort . . . has the responsibility to be on the spot almost literally at all times, to check things out, and make sure things work smoothly. And in traveling, . . . things don't always go as planned, and it is important that you should be there so if something unexpected comes up, that you can try and be there to cope with it." (T. 225-226).

The Court was free to disagree with whether it might have thought Prejean acted unreasonably. But it cannot plausibly hold that the jury's finding that Prejean did act unreasonably was itself an unreasonable finding which was unsupported by the evidence.

Similarly, the undisputed trust and reliance placed upon Prejean by the Bellangers belies completely any assumption that a jury could not reasonably have concluded that her cautioning them to wait for a second bus would have caused them to wait for one.

Prejean, as the Court of Appeals correctly noted, could not have used "force" to keep the Bellangers with her. That is not the point. She did not have to use force;

advice alone would have sufficed — a conclusion the jury seems also to have reached. But Prejean did not even tender simple advice, much less attempt stronger action.

B. The Jury Reasonably Concluded That Prejean's Presence On The Bus Could Have Avoided The Accident, Rendering Her Failure To Be On The Bus A Proximate Cause Of The Accident.

The Court's second conclusion was that

> "Even if Mrs. (sic) Prejean could have found some way to accompany the Bellangers on the first bus, and the evidence is clear that this was not possible, the evidence does not show that she could have prevented the accident from happening." Opinion, p. 6a.

This conclusion misapplies the applicable test as much as the Court of Appeals' first conclusion does. First, it does not take into account the fact that had Prejean kept the Bellangers with her, they would not have been on the first bus. The jury was reasonable in concluding that Prejean's failure to keep them with her was *a* proximate cause of the Bellangers' meeting with fate. Second, the conclusion ignores the evidence presented to the jury by travel expert McIntosh that an escort who authoritatively asserts himself or herself *does make a difference.*

The evidence showed that only one passenger on the first bus even attempted to ask the bus driver to slow down — and he did so in colloquial American language that a Guatemalan might not reasonably be expected to comprehend. The passenger, Fred Lawrence, asked simply: "Where is the fire?":

> "Q. Other than the comment, 'Where is the fire?' did you have any other comments or even conversations with the bus driver yourself?
>
> A. No, other than that." (T. 153).

No one else on the bus tried to slow the driver down. But *without contradiction* McIntosh testified how a competent travel escort could make a difference:

> "Q. In your opinion, does a travel escort have the power in a situation where he or she is aboard a bus as part of this tour, to act in the event that the driver of that particular bus is in some way driving improperly?
>
> A. I would, and I think that the answer would be yes." (T. 226).

He pointed out:

> "I find that if you assert your authority particularly in foreign countries, people are used

to this. And if someone stands up and says, 'I'm in authority, and we will do what I say,' that you can get a very good response, too." (T. 228).

The Court of Appeals was free to disagree with McIntosh. It was not equally free to conclude that the jury was not presented evidence on which it could reasonably conclude that Prejean's failure to be on the Bellanger bus was not *a* proximate cause of the accident. The testimony in fact tends to prove that she clearly would have made a difference; and the point is that all that is required to sustain the verdict is for this conclusion to be supported by reasonable evidence. It was.

CONCLUSION

We ask no more than that this Court vindicate petitioners' rights to a jury trial, which the Fifth Circuit unconstitutionally and unconscionably invaded. This Court is their last resort.

The writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of June 1981, three copies of the Petition for Writ of Certiorari were forwarded to William H. Syll, Jr., P. O. Drawer C, 1615 Metairie Road, Metairie, Louisiana 70055, by mailing the same by United States mail, properly addressed, and first class postage prepaid. I further certify that all parties required to be served have been served.

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

No. 79-1435

MRS. MAXINE BARBALICH, Widow of CHARLES A. BELLANGER, ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN AUTOMOBILE ASSOCIATION, ET AL.,
Defendants,

AMERICAN AUTOMOBILE ASSOCIATION,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 6, 1981)

Before GOLDBERG, CHARLES CLARK and REAVLEY, Circuit Judges.

PER CURIAM:

This suit was brought to recover damages for the death of Charles A. Bellanger and injuries to Mrs. Maxine Barbalich Bellanger, his widow. The injuries occured as a result of a collision involving the Guatemalan bus on which the Bellangers were riding during a shore excursion taken as part of a Caribbean vacation cruise. After a jury trial, the district court found the defendant, the American Automobile Association (AAA), negligent and liable for the plaintiffs' injuries.

AAA now appeals this judgment, contending that it breached no duty to the plaintiffs, and that its conduct, if indeed negligent, was not a cause of the plaintiffs' injuries. In the alternative, should we affirm the district court's determinations of negligence and causation, AAA asks that we find that AAA is entitled to full idemnification from the other defendants rather than contribution, as ordered by the district court. Further, AAA questions the district court's determination that the defendant Gray Line Tours of Guatemala was subject to the court's personal jurisdiction.

Under the *Boring* test, *Boring Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), we find that the evidence presented at trial was insufficient to present a question for the jury on negligence and causation. Accordingly, we reverse the judgment of the district court.

In the summer of 1974, Mr. and Mrs. Bellanger contacted Mrs. Zelia Prejean of the Worldwide Travel Division of AAA in Metairie, Louisiana about tours available for the coming fall. Mrs. Prejean suggested that the Bellangers go on a Royal Viking Lines Caribbean cruise with a group from New Orleans that she was organizing. Mrs. Prejean was hoping to put together a group of fifteen or more people for the cruise in order to receive a complimentary ticket and accompany the group herself. The Bellangers followed Mrs. Prejean's advice and made arrangements to go on the cruise and take several of the shore excursions offered. Mrs. Prejean put together a group of seventeen people from New Orleans for the trip and she received a complimentary ticket.

On October 30, 1974, 39 people, including the Bellangers, Mrs. Prejean, and one other from the New Orleans group, Ms. Cross, departed the ship on a shore excursion to Lake Izabel in Guatemala. After the lake excursion, small buses took the group back to the ship. The Bellangers hurried to get on the first bus and Mrs. Prejean and Ms. Cross waited for the second. On the way back to the ship, the Bellangers' bus collided with a farm truck going in the opposite direction. Both of the Bellangers were injured, and Mr. Bellanger died shortly thereafter in a Guatemalan hospital.

Mrs. Bellanger and her daughters joined as defendants in this action: AAA, the travel agent that booked the cruise and the shore excursion; Columbus Inter-

national, the conductor of the shore excursion; Gray Line Tours of Guatemala, the owner and operator of the bus; the bus driver; and Royal Viking Lines, the ship and cruise operator. On the eve of the trial, Columbus and Royal settled with the plaintiffs, leaving AAA as the only defendant before the jury. (The Guatemalan corporation and individual never answered the plaintiffs' petition. The district court ultimately granted a default judgment against Gray Line and dismissed the action against the bus driver for lack of personal jurisdiction.)

The jury rendered a verdict against AAA, with affirmative jury responses as to whether AAA was negligent, whether it breached an agreement with the Bellangers, and whether its conduct caused the accident and the plaintiff's injuries. The district court rendered judgment accordingly.

AAA first argues that the district court erred in submitting the negligence issue to the jury as AAA owed no duty to the Bellangers. AAA contends that Mrs. Prejean accompanied the cruise and excursion merely as a tour "hostess" with purely social responsibilities rather than as a tour "escort" or "guide" with responsibility for the tour members' safety on the trip. For purposes of this opinion, however, we assume, as the jury apparently decided, that Mrs. Prejean did have responsibility as a tour escort for the Bellanger's safety during the course of the cruise and the shore excurison. We find, however, that such responsibility did not con-

tinue after the Bellangers left Mrs. Prejean in order to board the first bus.

The plaintiffs' expert, Mr. McIntosh, testified that a tour escort has the duty to keep the group together and see that the group does not get separated from the escort's watchful and protective eye. Mr. McIntosh also testified, however, that often it is impossible for the escort to accompany every member of the group at all times. For instance, some members of a group on a cruise may want to go on a shore excursion while others wish to stay on the ship or go ashore on their own. In such a situation, Mr. McIntosh testified that it becomes a matter of individual election: Those who elect to go with the escort elect to take advantage of whatever protection that the presence of the escort may afford; those who elect to go on their own elect to forego the protection and guidance of the tour escort. Therefore, during the shore excursion, Mrs. Prejean was not responsible for those members of the New Orleans group who decided not to go with her on the excursion to Lake Izabel.

Similarly, under the evidence presented by plaintiffs' own expert, Mrs. Prejean was not responsible for the Bellanger's safety after they decided to take the first bus back to the ship. Mrs. Bellanger testified that she was very tired and wanted to be sure to get on one of the first two buses going back to the ship rather than await the third. Only two seats were available on the first bus, so Mr. and Mrs. Bellanger hurried to take

them. Mrs. Prejean and Ms. Cross were told by Columbus personnel to take the last two seats on the second bus.

The plaintiffs contend that Mrs. Prejean's duty dictated that she force the Bellangers to wait with her and Ms. Cross for the third bus so that they could all ride together. Even had Mrs. Prejean asked the Bellangers to wait, the evidence is that the Bellangers would not have waited for the last bus. In Mrs. Bellanger's testimony she gave no indication to the contrary. The Bellangers made a conscious decision to ride the first bus even though there was no room for Mrs. Prejean in that bus. In making this decision, they decided to forego any protection which Mrs. Prejean could have given on the bus. Therefore, we hold that during the bus ride AAA owed no duty to the Bellangers. The district judge should have granted AAA's motion for directed verdict or for judgment notwithstanding the verdict on that issue.

Even if Mrs. Prejean could have found some way to accompany the Bellangers on the first bus, and the evidence is clear that this was not possible, the evidence does not show that she could have prevented the accident from happening. Under Louisiana law, "[a] negligent party may not be held liable where his negligence is not a cause in fact of the accident — i.e., where the negligence is not a substantial factor in bringing about the harm. *Dixie Drive It Yourself System v. American Beverage Company*, 242 La. 471, 137 So.2d 298

(1962); Restatement of Torts, 2d, Sections 431-33 (1965)." *LeJeune v. Allstate Insurance Co.*, 365 So.2d 471, 475 (La. 1978). After considering all of the evidence in the light most favorable to the plaintiffs, we find that reasonable men could not conclude that AAA's conduct was a proximate cause of the accident.

Mr. McIntosh testified that, generally, in foreign countries, one will get good response from an assertion of authority. Therefore, the plaintiffs contend that had Mrs. Prejean asserted her authority and asked the bus driver to drive more slowly he would have complied. The evidence, however, does not indicate that this bus driver would have obeyed Mrs. Prejean. The evidence shows that several of the passengers on the bus asked the driver to slow down, but he paid no attention. We have no reason to believe that he would have reacted any differently to Mrs. Prejean's request. The bus driver was employed by Gray Line Tours of Guatemala, under the direction of Columbus International. AAA had no authority over the bus driver and there is no reason to believe that the driver would have listened to anyone other than the Columbus International representative who accompanied the excursion, but who waited for the third bus.

Even if the driver had slowed down, the plaintiffs failed to present evidence showing that such action alone would have avoided the accident. The accident occurred on a long stretch of straight flat road. The

driver had ample opportunity to see the "kamikaze" farm truck driving down the middle of the road. Both drivers, however, failed to act to avoid the collision in the final seconds before impact. It is unrealistic to believe that Mrs. Prejean could have somehow averted the collision in those final seconds.

It is unnecessary for us to decide the other issues raised by appellant on appeal. We REVERSE the judgment of the district court and REMAND, with instructions to enter judgment for AAA.

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1435

MRS. MAXINE BARBALICH, Widow of CHARLES A. BELLANGER, ET AL.,
Plaintiffs-Appellees,

versus

AMERICAN AUTOMOBILE ASSOCIATION, ET AL.,
Defendants,

AMERICAN AUTOMOBILE ASSOCIATION,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(April 1, 1981)

BEFORE GOLDBERG, CHARLES CLARK and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS M. REAVLEY
United States Circuit Judge

CLERK'S NOTE:
See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

APPENDIX III

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. MAXINE BARBALICH, WIDOW OF CHARLES A. BELLANGER, MRS. CAROLE BELLANGER, WIFE OF JOHN STEVEN WELSH,* AND MRS. JOAN BELLANGER, WIFE OF THOMAS E. FRANCIS

versus C.A. No. 75-1757(B)

AMERICAN AUTOMOBILE ASSOCIATION, COLUMBUS LINE INC., doing business as COLUMBUS INTERNATIONAL, GRAY LINE TOURS OF GUATEMALA, GUATEMALA SIGHTSEEING ENTERPRISES, GREYHOUND CORPORATION, GREYHOUND BUS LINES, doing business as GREYHOUND SIGHTSEEING OF GUATEMALA, XYZ INSURANCE COMPANY, and ANDREW CLOCK GARCIA

Filed: June 7, 1975

COMPLAINT

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF LOUISIANA:

The complaint of Mrs. Maxine Barbalich, widow of Charles A. Bellanger, Mrs. Carole Bellanger, wife of

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* Mrs. Carole Bellanger is the wife of John Steven *Nash*. She is listed incorrectly as the wife of *John Steven Welsh* on this and other documents.

John Steven Welsh, and Mrs. Joan Bellanger, wife of Thomas E. Francis, all persons of the full age of majority and residents of and domiciled in the Parish of Orleans, Louisiana, with respect represents:

I.

Complainant, Mrs. Maxine Barbalich, widow of Charles A. Bellanger, resides at 6264 Canal Boulevard; complainant, Mrs. Carole Bellanger, wife of John Steven Welsh, resides at 2915 Calhoun Street; and complainant, Mrs. Joan Bellanger, wife of Thomas E. Francis, resides at 6264 Canal Boulevard.

II.

The following parties are made defendant herein: *American Automobile Association*, a corporation organized under the laws of a state other than Louisiana; *Columbus Line Inc.*, doing business as Columbus International, a corporation organized under the laws of a state other than Louisiana; *Gray Line Tours of Guatemala*, a corporation organized under the laws of a state other than Louisiana; *Guatemala Sightseeing Enterprises*, a corporation organized under the laws of a state other than Louisiana; *Greyhound Corporation*, doing business within the jurisdiction of this Court, through a wholly owned subsidiary under the name Greyhound Bus Lines, and doing business in Guatemala under the name Greyhound Sightseeing, corporations organized under the laws of a state other than Louisiana; XYZ Insurance Company, domiciled out of the State of Louisiana; and

Andrew Clock Garcia, an individual domiciled in the United States in a state other than Louisiana.

III.

Complainant, Mrs. Maxine Barbalich Bellanger, is the widow of Charles A. Bellanger, and Mrs. Carole Bellanger, wife of John Steven Welsh, and Mrs. Joan Bellanger, wife of Thomas E. Francis, are the children of Charles A. Bellanger, who was killed in a certain highway accident near Puerto Barrios, Guatemala, on *October 30, 1974.*

IV.

Complainant, Mrs. Maxine Barbalich, widow of Charles A. Bellanger, and her late husband, Charles A. Bellanger, were lawfully married in New Orleans, Louisiana, on March 14, 1942, from which marriage only two children were born, namely, your complainants, Mrs. Carole Bellanger Welsh and Mrs. Joan Bellanger Francis. The said Mrs. Maxine Barbalich Bellanger and Charles A. Bellanger never adopted anyone.

V.

At the time of the bus accident hereinafter described complainant, Mrs. Maxine Barbalich Bellanger, and her said husband, were passengers on a cruise aboard the SS ROYAL VIKING SEA which, on the voyage in ques-

tion to Guatemala, Central America, docked at the port of Puerto Barrios, and all arrangements were negotiated in the New Orleans area through the defendant, American Automobile Association, at their office 3445 North Causeway Boulevard, Metairie, Louisiana.

VI.

In connection with the said cruise Mr. and Mrs. Charles A. Bellanger purchased from the defendant, American Automobile Association, through its local office at 3445 North Causeway Boulevard, Metairie, Louisiana, for full and adequate monetary consideration, a round trip ticket ashore from the said ship at Puerto Barrios for a cruise up a certain river to Lake Izabel, there to visit Mayan Ruins and installations, and then return by bus to the ship, full payment being made by checks to the order of American Automobile Association.

VII.

Defendant, American Automobile Association, arranged for the said land passage from defendant, Columbus Line Inc., doing business as Columbus International, a corporation organized under the laws of a state other than Louisiana, but which did business in the State of Louisiana through various agents, including defendant, American Automobile Association, as the delegated agent of defendant, Columbus Inter-

national. The said American Automobile Association issued its own checks as refunds on the said ill fated bus trip.

VIII.

Defendant, Columbus Line Inc., doing business under the name Columbus International, in turn, *contracted with Gray Line Tours of Guatemala and Guatemala Sightseeing Enterprises*, corporations organized under the laws of a state other than Louisiana, and which contracted with Columbus International for the American Automobile Association for the said passage and transportation for monetary value, as delegated agent of American Automobile Association and Columbus International.

IX.

Defendant, Andrew Clock Garcia, domiciled in the United States, in a state other than Louisiana, was the driver of the said bus in which the Bellangers were passengers for hire at the time of the accident, and was at the time employed by defendant, Guatemala Sightseeing and acted as agent of all other defendants.

X.

Defendant Greyhound Corporation, doing business within the jurisdiction of this Court, through a wholly owned subsidiary under the name Greyhound Bus Lines, and doing business in Guatemala under the

name Greyhound Sightseeing, 11A Calle 6-32, Zona 1, Guatemala City, Guatemala, is a corporation organized under the laws of a state other than Louisiana, was the owner of the vehicle in question operated by their own employee who negligently caused the said accident.

XI.

Defendant XYZ Insurance Company, domiciled out of the State of Louisiana, whose legal name and address complainants do not know at present, was the liability insurer of all defendants, and as such is liable as a party defendant in the premises.

XII.

All defendants benefitted economically and financially from the said contract for the carriage of passengers ashore in Guatemala, made and entered into in New Orleans, Louisiana, within the jurisdiction of this Honorable Court, and as a result of the sale of the said transportation in Puerto Barrios, Guatemala of passengers for hire from the said vessel to Lake Izabel and return to the said vessel. Accordingly, defendants are answerable before this Honorable Court which under the law has diversity jurisdiction in the premises, particularly 28 U.S. Code 1332.

XIII.

Accompanying the passengers on the said bus trip was a hostess in the employ of Columbus International

whose duty it was to cooperate with the driver of the said bus and supervise the said trip and for whose official activities all defendants are answerable under the law.

XIV.

On the day in question, while at a distance of about thirty miles north of Puerto Barrios and on the return trip by highway to the said vessel from Lake Izabel, the driver of the said Gray Line bus negligently collided with a truck, as the result of which several passengers were killed including complainants' husband and father, Charles A. Bellanger, who was fatally injured, and died shortly thereafter in Guatemala from the said injuries.

XV.

Complainant, Mrs. Maxine Barbalich Bellanger, was also injured in the said accident, together with many other passengers, and required hospitalization and incurred attendant expenses, all proximately caused by the said accident.

XVI.

The said accident resulted from the gross negligence on the part of the driver of the said Gray Line bus for which all defendants are answerable in law, in the following respects:

1. Failing to maintain a proper lookout for the safety of the passengers of the said bus;

2. Driving over the center of the road in question when the collision was imminent, instead of steering said bus to the right of the road so as to avoid the said accident;

3. Travelling at an excessive rate of speed;

4. Driving recklessly;

5. Failing to keep the said bus under control;

6. Failing to take proper evasive action to avoid a collision;

for which all defendants are answerable in law "in solido" for the damages incurred by complainants.

XVII.

As the result of the said death of Charles A. Bellanger and the foregoing acts of negligence, complainants are entitled to recover, as designated beneficiaries from all of said defendants "in solido" under Article 2315 of the Civil Code of Louisiana, the following sums:

Mrs. Maxine Barbalich Bellanger, for physical pain and suffering of decedent, loss of support and spousal companionship

$500,000.00

Mrs. Carole Bellanger Welsh, for physical pain and suffering of decedent and loss of parental company

$200,000.00

Mrs. Joan Bellanger Francis, for physical pain and suffering of decedent and loss of parental company

$200,000.00

XVIII.

In addition, complainant, Mrs. Maxine Barbalich Bellanger, is entitled to recover for her own injuries and expenses the sum of $100,000.00

XIX.

Complainants allege amicable demand without avail.

XX.

All of the said defendants are liable in solido, and complainants pray for judgment for the amounts above set forth, together with interest from the date of judicial demand, and all costs of this proceeding.

XXI.

Complainants request trial by jury.

WHEREFORE, complainants pray for judgment against all defendants "in solido" for the sums as above set forth.

And for all additional relief as law, equity and the nature of the case may require.

/s/ Leon Sarpy
Leon Sarpy

/s/ Jarrell E. Godfrey, Jr.
Jarrell E. Godfrey, Jr.

Attorneys for Complainants
1500 First National Bank of
Commerce Building
New Orleans, La. 70112
529-3121

OF COUNSEL:
CHAFFE, McCALL,
PHILLIPS, TOLER
& SARPY
1500 First National Bank
of Commerce Building
New Orleans, La. 70112
529-3121

PLEASE SERVE DEFENDANTS:

The American Automobile Association, Inc.
through its registered agent for service of process
C. T. CORPORATION SYSTEM
1300 Hibernia Building
New Orleans, Louisiana

Greyhound Lines Inc.
through its registered agent for service of process
C. T. CORPORATION SYSTEM
1300 Hibernia Building
New Orleans, Louisiana

All other defendants will be served in accordance with the Louisiana Long Arm Statute.

APPENDIX IV

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. MAXINE BARBALICH, widow of CHARLES A. BELLANGER, ET AL.,

versus C.A. No. 75-1757
Section "B"

AMERICAN AUTOMOBILE ASSOCIATION, ET AL.,

SUPPLEMENTAL AND AMENDED COMPLAINT

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF LOUISIANA:

The supplemental and amended complaint of Mrs. Maxine Barbalich, widow of Charles A. Bellanger, Mrs. Carole Bellanger, wife of John Steven Welsh, and Mrs. Joan Bellanger, wife of Thomas E. Francis, all persons of the full age of majority and residents of and domiciled in the Parish of Orleans, Louisiana, with respect represents:

I.

Plaintiffs desire to supplement and amend the complaint filed in this proceeding by adding thereto Article XXII to read as follows:

XXII.

Plaintiffs desire to add as party defendant in this proceeding The Gray Line Companies Associated Inc. (which does business in this State and elsewhere including Guatemala under the trade name The Gray Line), a corporation which your plaintiffs allege, believe and therefore aver is a corporation organized under the laws of a state other than Louisiana, which owned or controlled the bus described in the complaint, particularly Article IX, which bus was operated at the time of the accident by employees, agents, partners and/or associates of The Gray Line and The Gray Line Companies Associated Inc., and is accordingly liable to plaintiffs in solido, together with the other defendants.

WHEREFORE, the premises considered plaintiffs pray for an order from this Honorable Court authorizing the filing of the said supplemental and amended complaint.

/s/ Leon Sarpy
Leon Sarpy

/s/ Jarrell E. Godfrey, Jr.
Jarrell E. Godfrey, Jr.
Attorneys for Complainants
1500 First National Bank of
Commerce Building
New Orleans, La. 70112
529-3121

OF COUNSEL:
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY
1500 First National Bank
of Commerce Building
New Orleans, La. 70112
529-3121

ORDER

Let the above supplemental and amended complaint be filed,

New Orleans, Louisiana, October 21, 1975.

/s/ FRED J CASSIBRY
Judge

PLEASE SERVE
Gray Line Motor Tours, Inc.
through their proper officer,
1600 Annunciation Street
New Orleans, La. 70130

The Gray Line Companies
Associated Inc. will be served
in accordance with the
Louisiana Long Arm Statute.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 21st day of October, 1975, served a copy of the foregoing pleading on counsel for parties to this proceeding who have put in appearance or have communicated with counsel for plaintiffs, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Leon Sarpy
Leon Sarpy

APPENDIX V

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. MAXINE BARBALICH, WIDOW OF CHARLES A. BELLANGER, et al.,

versus S.A. No. 75-1757
Section B

AMERICAN AUTOMOBILE ASSOCIATION, et al.,

SPECIAL VERDICT
INTERROGATORIES

1. Was the defendant American Automobile Association negligent with respect to the Bellangers?

Yes ✓ No ___

Go on to answer Interrogatory No. 2.

2. Did the defendant American Automobile Association breach an agreement, if any, with the Bellangers?

Yes ✓ No ___

If your answer to both interrogatories is "No," then answer no further interrogatories. If your answer to either of the above interrogatories is "Yes," then answer Interrogatory No. 3.

3. Did the conduct of American Automobile Association *proximately cause*, the injuries, if any, to the plaintiffs?

Yes ✓ No ___

If your answer is "No," answer no further interrogatories. If your answer is "Yes," answer Interrogatory No. 4.

4. What amount would fairly and adequately compensate Mrs. Maxine Barbalich for her personal injuries in this case, not including any consideration of her injuries connected with loss of her husband?

$25,000

Answer Interrogatory No. 5.

5. What amount will fairly and adequately compensate the plaintiffs for their injuries as a result of the death of Charles A. Bellanger?

Maxine Barbalich Bellanger	$215,000	215
Carole Bellanger Welsh	$ 15,000	15
Joan Bellanger Francis	$ 12,000	12
		25
		$267,000

/s/ J. PFIFFER
FOREMAN

New Orleans, Louisiana
March 23, 1978

APPENDIX VI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. MAXINE BARBALICH, WIDOW OF CHARLES A. BELLANGER, ET AL.,

versus C.A. No. 75-1757
Section "B"

AMERICAN AUTOMOBILE ASSOCIATION, ET AL.

JUDGMENT

Considering the decision of the United States Court of Appeals for the Fifth Circuit, of March 6, 1981,

IT IS ORDERED, ADJUDGED AND DECREED that the judgment previously rendered by this Court on June 15, 1978 be and the same is hereby VACATED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Maxine Barbalich, widow of Charles A. Bellanger, and against Guatemala Sightseeing Enterprises in the full and true sum of TWO HUNDRED FORTY THOUSAND AND NO/100 ($240,000.00) DOLLARS, with interest at the rate of SEVEN (7%) PER CENT per annum from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Carole Bellanger Welsh and against Guatemala Sightseeing Enterprises in the full and true sum of FIFTEEN THOUSAND and NO/100 ($15,000.00) DOLLARS, with interest at the rate of SEVEN (7%) PERCENT per annum from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Joan Bellanger Francis and against Guatemala Sightseeing Enterprises in the full and true sum of TWELVE THOUSAND AND NO/100 ($12,000.00) DOLLARS, with interest at the rate of SEVEN (7%) PER CENT per annum from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the American Automobile Association against Maxine Barbalich, widow of Charles A. Bellanger, Carole Bellanger Welsh, and Joan Bellanger Francis, dismissing their claim as to that defendant, and judgment in

favor of the American Automobile Association and against Maxine Barbalich, widow of Charles A. Bellanger, Carole Bellanger Welsh, and Joan Bellanger Francis for costs.

New Orleans, Louisiana, this 19th day of May, 1981.

/s/ FREDERICK J.R. HEEBE
UNITED STATES
DISTRICT JUDGE